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# MONTANA LEGISLATIVE HISTORY

Chapter 490 19 95

Bill H _____ S 200 Original bill & history / C

| H. Committee on Natural Res | | S. Committee on Judiciary | |
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| Hearing Date(s) 3-6 | ____C | Hearing Date(s) 1-31 | ____C |
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| Date Out 3-3 | ____C | | |

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Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

SENATE BILL NO. 200

INTRODUCED BY Speaker Ken Mottel (by request) Anderson Burkhart Bob Brown Farlowe HARP

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE COMPREHENSIVE ENVIRONMENTAL CLEANUP AND RESPONSIBILITY ACT; CLARIFYING THE EXEMPTION FROM LIABILITY FOR PERSONS HOLDING INDICIA OF OWNERSHIP PRIMARILY TO PROTECT SECURITY INTERESTS; AMENDING SECTIONS 75-10-701, 75-10-711, 75-10-715, 75-10-718, AND 75-10-722, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

STATEMENT OF INTENT

A statement of intent is included with this bill because of the authorization granted to the department in 75-10-702 to adopt rules to implement Title 75, chapter 10, part 7, including implementation of the exemption from liability for persons holding indicia of ownership primarily to protect a security interest. To date, the department has not adopted rules under this section.

The legislature finds that existing state law related to the liability of persons holding security interests for environmental contamination is unclear and that this lack of clarity has created uncertainty on the part of security interest holders as to whether they are liable for environmental contamination caused by their borrowers or other third parties. The uncertainty has negatively affected the availability of credit in Montana.

In enacting Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA), the legislature modeled the statute after and borrowed many terms from the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The legislature specifically borrowed the term "own or operate", which excludes from liability those persons who, without participating in the management of the facility, hold indicia of ownership merely to protect a security interest.

When significant questions arose under CERCLA as to the scope of the terms "indicia of ownership" and "participating in the management of the facility", the federal government devoted substantial effort to developing a federal policy and a rule that employ a framework of specific tests to provide clearer articulation of a lender's scope of liability under CERCLA, both to governmental agencies and to third parties. The April 1992 rule, which appears at 40 CFR 300.1100, et seq., was preceded by many public hearings and public comment periods. Although the rule was recently judged to be technically beyond

EPA's rulemaking authority, the contents of the rule still constitute EPA policy on the scope of the secured creditor exemption under CERCLA and the legislature finds that the rule in its current form provides a well-reasoned basis for interpreting the identical language in CECRA.

Therefore the legislature finds that the clarification of potential liability in a manner consistent with federal statutes, current EPA policy, and the regulations at 40 CFR 300.1100, et seq., is desirable in order to provide certainty for security interest holders, including persons engaged in lease financing, to enhance the availability of credit, and to encourage responsible practices by those security interest holders and borrowers to protect the public health and environment.

The legislature also finds that uncertainty exists in state law regarding the potential liability of certain fiduciaries for environmental contamination on property held in their fiduciary capacity and determines that a similar limited exemption from liability should apply to fiduciaries.

Therefore, in adopting rules under 75-10-702 to implement the exemption under 75-10-701(10)(b) for holders of "the indicia of ownership", the department of health and environmental sciences shall adopt rules consistent with the revisions to CECRA contained in this bill, including rules that address fiduciaries within the exemption. The rules also must be consistent with and parallel to the federal regulations set forth at 40 CFR 300.1100, et seq.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 75-10-701, MCA, is amended to read:

"**75-10-701. Definitions.** As used in this part, unless the context requires otherwise, the following definitions apply:

(1) "Department" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21.

(2) "Director" means the director of the department of health and environmental sciences.

(3) "Environment" means any surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the state of Montana or under the jurisdiction of the state of Montana.

(4) (a) "Facility" means:

(i) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer

or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft; or

(ii) any site or area where a hazardous or deleterious substance has been deposited, stored, disposed of, placed, or otherwise come to be located.

(b) The term does not include any consumer product in consumer use.

(5) "Fiduciary" means a trustee, executor, administrator, guardian, receiver, conservator, personal representative, or other person holding property in a fiduciary capacity.

(6) "Foreclosure" means acquisition of title to property through foreclosure, purchase at foreclosure sale, assignment or acquisition of title in lieu of foreclosure, repossession in the case of a lease financing transaction, or acquisition of a right to title or other agreement in full or partial settlement of a loan obligation.

~~(5)~~(7) "Fund" means the environmental quality protection fund established in 75-10-704.

~~(6)~~(8) "Hazardous or deleterious substance" means a substance that because of its quantity, concentration, or physical, chemical, or infectious characteristics may pose an imminent and substantial threat to public health, safety, or welfare or the environment and is:

(a) a substance that is defined as a hazardous substance by section 101(14) of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601(14), as amended;

(b) a substance identified by the administrator of the United States environmental protection agency as a hazardous substance pursuant to section 102 of CERCLA, 42 U.S.C. 9602, as amended;

(c) a substance that is defined as a hazardous waste pursuant to section 1004(5) of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6903(5), as amended, including a substance listed or identified in 40 CFR 261; or

(d) any petroleum product.

~~(7)~~(9) "Natural resources" means land, fish, wildlife, biota, air, surface water, ground water, drinking water supplies, and any other ~~such~~ resources within the state of Montana owned, managed, held in trust or otherwise controlled by or appertaining to the state of Montana or a political subdivision of the state.

~~(8)~~(10) (a) "Owns or operates" means owning, leasing, operating, managing activities at, or exercising control over the operation of a facility.

(b) The term does not include holding the indicia of ownership of a facility primarily to protect a security interest in the facility or other location unless the holder has participated in the management of the facility. The term does not apply to the state or a local government that acquired ownership or control through bankruptcy, tax delinquency, abandonment, lien foreclosure, or other circumstances in which the government acquires title by virtue of its function as sovereign, unless the state or local government has caused or contributed to the release or threatened release of a hazardous or deleterious substance from the facility. The term also does not include the owner or operator of the Milltown dam licensed under part 1 of the Federal Power Act (FERC license No. 2543-004) if a hazardous or deleterious substance has been released into the environment upstream of the dam and has subsequently come to be located in the reservoir created by the dam, unless the owner or operator is a person who would otherwise be liable for a release or threatened release under 75-10-715(1).

~~(9)~~(11) "Person" means an individual, trust, firm, joint stock company, joint venture, consortium, commercial entity, partnership, association, corporation, commission, state or state agency, political subdivision of the state, interstate body, or the federal government, including a federal agency.

~~(10)~~(12) "Petroleum product" includes gasoline, crude oil (except for crude oil at production facilities subject to regulation under Title 82), fuel oil, diesel oil or fuel, lubricating oil, oil sludge or refuse, and any other petroleum-related product or waste or fraction ~~thereof~~ of the product or waste that is liquid at standard conditions of temperature and pressure (60 degrees F and 14.7 pounds per square inch absolute).

~~(11)~~(13) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous or deleterious substance directly into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous or deleterious substance), but excludes releases confined to the indoor workplace environment, the use of pesticides as defined in 80-8-102(30) when they are applied in accordance with approved federal and state labels, and the use of commercial fertilizers as defined in 80-10-101(2) when applied as part of accepted agricultural practice.

~~(12)~~(14) "Remedial action" includes all notification, investigation, administration, monitoring, cleanup, restoration, mitigation, abatement, removal, replacement, acquisition, enforcement, legal action, health studies, feasibility studies, and other actions necessary or appropriate to respond to a release or threatened release.

~~(13)~~(15) "Remedial action contract" means a written contract or agreement entered into by a remedial action contractor with the state, or with a potentially liable person acting pursuant to an order or request issued by the department, the United States, or any federal agency, to provide a remedial action with respect to a release or threatened release of a hazardous or deleterious substance.

~~(14)~~(16) "Remedial action contractor" means:

(a) any person who enters into and is carrying out a remedial action contract; or

(b) any person who is retained or hired by a person described in subsection ~~(14)(a)~~ (16)(a) to provide services relating to a remedial action.

~~(15)~~(17) "Remedial action costs" means reasonable costs that are attributable to or associated with a remedial action at a facility, including but not limited to the costs of administration, investigation, legal or enforcement activities, contracts, feasibility studies, or health studies.

(18) "Third party" means a person or entity, other than a state or state agency, a political subdivision of the state, or the federal government or a federal agency, that seeks to enforce federal, state, or local environmental requirements or remedies, that seeks to recover remedial action costs, or that seeks liability apportionment or contribution under 75-10-724.

(19) "Third-party liability" means liability to a third party for any claims that arise from contamination of property by hazardous or deleterious substance, including but not limited to claims for personal injury, property damage, environmental cleanup, and remedial action costs expended by a third party."

**Section 2.** Section 75-10-711, MCA, is amended to read:

"**75-10-711. Remedial action -- orders -- penalties -- judicial proceedings.** (1) The department may take remedial action whenever:

(a) there has been a release or there is a substantial threat of a release into the environment that may present an imminent and substantial endangerment to the public health, welfare, or safety or the environment; and

(b) the appropriate remedial action will not be done properly and expeditiously by any person liable under 75-10-715(1).

(2) Whenever the department is authorized to act pursuant to subsection (1) or has reason to believe that a release has occurred or is about to occur, the department may undertake remedial action in

the form of any investigation, monitoring, survey, testing, or other information-gathering as authorized by 75-10-707 that is necessary and appropriate to identify the existence, nature, origin, and extent of the release or the threat of release and the extent and imminence of the danger to the public health, safety, or welfare or the environment.

(3) Any person liable under 75-10-715(1) must take immediate action to contain, remove, and abate the release. Except as provided in 75-10-712, the department is authorized to draw upon the fund to take action under subsection (1) if it has made diligent good faith efforts to determine the identity of the person or persons liable for the release or threatened release and:

(a) is unable to determine the identity of the liable person or persons in a manner consistent with the need to take timely remedial action; or

(b) the person or persons determined by the department to be liable under 75-10-715(1) have been informed in writing of the department's determination and have been requested by the department to take appropriate remedial action but are unable or unwilling to take action in a timely manner; and

(c) the written notice to each person informs ~~him~~ the person that if ~~he is~~ subsequently found liable pursuant to 75-10-715(1), ~~he~~ the person may be required to reimburse the fund for the state's remedial action costs and may be subject to penalties pursuant to ~~75-10-715(3)~~ 75-10-711(5).

(4) Whenever the department is authorized to act pursuant to subsection (1) or has reason to believe that a release that may pose an imminent and substantial threat to the public health, safety, or welfare or the environment has occurred or is about to occur, it may issue to any person liable under 75-10-715(1) cease and desist, remedial, or other orders as may be necessary or appropriate to protect the public health, safety, or welfare or the environment.

(5) (a) A person who violates or fails or refuses to comply with an order issued under 75-10-707 or this section may, in an action brought to enforce the order, be assessed a civil penalty of not more than $10,000 for each day in which a violation occurs or a failure or refusal to comply continues. In determining the amount of any penalty assessed, the court may take into account:

(i) the nature, circumstances, extent, and gravity of the noncompliance; ~~and,~~

(ii) with respect to the person liable under 75-10-715(1)~~, his~~:

(A) the person's ability to pay;

(B) any prior history of ~~such~~ violations;

(C) the degree of culpability; and

(D) the economic benefit or savings, if any, resulting from the noncompliance; and

(iii) any other matters as justice may require.

(b) Civil penalties collected under ~~this~~ subsection (5)(a) must be deposited into the environmental quality protection fund established in 75-10-704.

(6) A court has jurisdiction to review an order issued under 75-10-707 or this section only in the following actions:

(a) an action under 75-10-715 to recover remedial action costs or penalties or for contribution;

(b) an action to enforce an order issued under 75-10-707 or this section;

(c) an action to recover a civil penalty for violation of or failure to comply with an order issued under 75-10-707 or this section; or

(d) an action by a person to whom an order has been issued to determine the validity of the order, only if the person has been in compliance and continues in compliance with the order pending decision of the court.

(7) In considering objections raised in a judicial action regarding orders issued under this part, the court shall uphold and enforce an order issued by the department unless the objecting party can demonstrate, on the administrative record, that the department's decision to issue the order was arbitrary and capricious or otherwise not in accordance with law.

(8) Instead of issuing a notification or an order under this section, the department may bring an action for legal or equitable relief in the district court of the county where the release or threatened release occurred or in the first judicial district as may be necessary to abate any imminent and substantial endangerment to the public health, safety, or welfare or the environment resulting from the release or threatened release.

(9) The department may take remedial action pursuant to subsection (1) at a site that is regulated under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Public Law 96-510, if the department determines that remedial action is necessary to carry out the purposes of this part."

**Section 3.** Section 75-10-715, MCA, is amended to read:

**"75-10-715. Liability -- reimbursement and penalties -- proceedings -- defenses.** (1) Notwithstanding any other provision of law and subject only to the defenses set forth in subsection ~~(5)~~ (7),

the following persons are jointly and severally liable for a release or threatened release of a hazardous or deleterious substance from a facility:

(a) a person who owns or operates a facility where a hazardous or deleterious substance was disposed of;

(b) a person who at the time of disposal of a hazardous or deleterious substance owned or operated a facility where the hazardous or deleterious substance was disposed of;

(c) a person who generated, possessed, or was otherwise responsible for a hazardous or deleterious substance and who, by contract, agreement, or otherwise, arranged for disposal or treatment of the substance or arranged with a transporter for transport of the substance for disposal or treatment; and

(d) a person who accepts or has accepted a hazardous or deleterious substance for transport to a disposal or treatment facility.

(2) A fiduciary or person who holds indicia of ownership in a facility solely to protect a security interest is not liable under subsections (1)(a) and (1)(b) or for third-party liability if the fiduciary or person is holding indicia of ownership for any of the following reasons:

(a) holding an interest in real or personal property when the interest is being held as security for payment or performance of an obligation, including but not limited to a mortgage, deed of trust, contract for deed, lien, security interest, assignment, pledge, or other right or encumbrance against real or personal property that is furnished by the owner to ensure repayment of a financial obligation;

(b) in the case of a fiduciary, acquiring control over or ownership status of a facility when the status arises by law upon appointment or when requiring or conducting any activity that is necessary to carry out the fiduciary's duties and that falls within the scope of the fiduciary's authority;

(c) requiring or conducting financial or environmental assessments of a facility or a portion of a facility, making financing conditional upon environmental compliance, or providing environmental information or reports;

(d) monitoring the operations conducted at a facility or providing access to a facility to the department or its agents or to remedial action contractors;

(e) having the mere capacity or unexercised right to influence a facility's management of hazardous or deleterious substances;

(f) giving advice, information, guidance, or direction concerning the general business and financial

aspects of a borrower's operations;

(g) providing general information concerning federal, state, or local laws governing the transportation, storage, treatment, and disposal of hazardous or deleterious substances and concerning the hiring of remedial action contractors;

(h) engaging in financial workouts, restructuring, or refinancing of a borrower's obligations;

(i) collecting rent, maintaining utility services, securing a facility from unauthorized entry, or undertaking other activities to protect or preserve the value of the security interest in a facility;

(j) extending or denying credit to a person owning or in lawful possession of a facility;

(k) taking title to a facility by foreclosure, provided that the holder of indicia of ownership, from the time the holder acquires title, undertakes to sell, re-lease property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest itself of the property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the facility and taking all facts and circumstances into consideration, and provided that the holder does not:

(i) outbid or refuse a bid for fair consideration for the property;

(ii) worsen the contamination at the facility;

(iii) incur liability under 75-10-715(1)(c) by arranging for disposal of hazardous or deleterious substances; or

(iv) engage in conduct described in subsection (3)(a) or (3)(b);

(l) in an emergency, requiring or undertaking activities to prevent exposure of persons to hazardous or deleterious substances or to contain a release; or

(m) requiring or conducting remedial action in response to a release or threatened release, provided that prior notice is given to the department and the department approves of the remedial action.

(3) The protection from liability provided in subsection (2) is not available to a fiduciary or to a person holding indicia of ownership primarily to protect a security interest if the fiduciary or person:

(a) through affirmative conduct, knowingly or recklessly:

(i) causes or contributes to a new release of hazardous or deleterious substances; or

(ii) allows others to cause or contribute to a new release of hazardous or deleterious substances; or

(b) in the case of a person holding indicia of ownership primarily to protect a security interest,

through affirmative conduct participates in the management of a facility by:

(i) exercising decisionmaking control over environmental compliance; or

(ii) exercising control at a level comparable to that of a manager of the enterprise with responsibility for day-to-day decisionmaking either with respect to environmental compliance or substantially all of the operational, but not financial or administrative, aspects of the facility.

~~(2)~~(4) A person identified in subsection (1) is liable for the following costs:

(a) all remedial action costs incurred by the state; and

(b) damages for injury to, destruction of, or loss of natural resources caused by the release or threatened release, including the reasonable technical and legal costs of assessing and enforcing a claim for the injury, destruction, or loss resulting from the release, unless the impaired natural resources were specifically identified as an irreversible and irretrievable commitment of natural resources in an approved final state or federal environmental impact statement or other comparable approved final environmental analysis for a project or facility that was the subject of a governmental permit or license and the project or facility was being operated within the terms of its permit or license.

~~(3)~~(5) If the person liable under ~~75-10-715~~ subsection (1) fails, without sufficient cause, to comply with a department order issued pursuant to 75-10-711(4) or to properly provide remedial action upon notification by the department pursuant to 75-10-711(3), the person may be liable for penalties in an amount not to exceed two times the amount of any costs incurred by the state pursuant to this section.

~~(4)~~(6) The department may initiate civil proceedings in district court to recover remedial action costs, natural resource damages, or penalties under subsections (1), ~~through (3)~~ (4), and (5). Proceedings to recover costs and penalties must be conducted in accordance with 75-10-722. Venue for any action to recover costs, damages, or penalties lies in the county where the release occurred or where the person liable under ~~75-10-715~~ subsection (1) resides or has its principal place of business or in the district court of the first judicial district.

~~(5)~~(7) ~~No~~ A person is not liable under subsections (1), ~~through (3)~~ (4), and (5) if ~~that~~ the person can establish by a preponderance of the evidence that:

(a) the department failed to follow the notice provisions of 75-10-711 when required;

(b) the release did not emanate from any vessel, vehicle, or facility to which the person contributed any hazardous or deleterious substance or over which the person had any ownership, authority, or control and was not caused by any action or omission of the person;

(c) the release or threatened release occurred solely as a result of:

(i) an act or omission of a third party other than either an employee or agent of the person; or

(ii) an act or omission of a third party other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the person, if the person establishes by a preponderance of the evidence that ~~he~~ the person:

(A) exercised due care with respect to the hazardous or deleterious substance concerned, taking into consideration the characteristics of the hazardous or deleterious substance in light of all relevant facts and circumstances; and

(B) took precautions against foreseeable acts or omissions of a third party and the consequences that could foreseeably result from those acts or omissions;

(d) the release or threat of release occurred solely as the result of an act of God or an act of war;

(e) the release or threatened release was from a facility for which a permit had been issued by the department, the hazardous or deleterious substance was specifically identified in the permit, and the release was within the limits allowed in the permit;

(f) in the case of assessment of penalties under subsection ~~(3)~~ (5), ~~that~~ factors beyond the control of the person prevented the person from taking timely remedial action; or

(g) the person accepted only household refuse (garbage, trash, or septic tank sanitary wastes generated by single or multiple residences, hotels, motels, restaurants, or similar facilities) for transport to a solid waste disposal facility, unless that person knew or reasonably should have known that the hazardous or deleterious substance was present in the refuse.

~~(6)~~(8) (a) For the purpose of subsection ~~(5)(c)(ii)~~ (7)(c)(ii), the term "contractual relationship" includes but is not limited to land contracts, deeds, or other instruments transferring title or possession, unless the real property on which the facility is located was acquired by the person after the disposal or placement of the hazardous or deleterious substance on, in, or at the facility and one or more of the following circumstances is also established by the person by a preponderance of the evidence:

(i) At the time the person acquired the facility, the person did not know and had no reason to know that a hazardous or deleterious substance that is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The person is a governmental entity that acquired the facility by escheat, lien foreclosure, or through any other involuntary transfer or acquisition or through the exercise of eminent domain authority

by purchase or condemnation.

(iii) The person acquired the facility by inheritance or bequest.

(b) In addition to establishing one or more of the circumstances in subsection ~~(6)(a)(i)~~ (8)(a)(i) through ~~(6)(a)(iii)~~ (8)(a)(iii), the person shall establish that ~~he~~ the person has satisfied the requirements of ~~subsections (5)(c)(i)~~ subsection (7)(c)(i) or ~~(5)(c)(ii)~~ (7)(c)(ii).

(c) To establish that the person had no reason to know, as provided in subsection ~~(6)(a)(i)~~ (8)(a)(i), the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of assessing this inquiry, the following must be taken into account:

(i) any specialized knowledge or experience on the part of the person;

(ii) the relationship of the purchase price to the value of the property if uncontaminated;

(iii) commonly known or reasonably ascertainable information about the property;

(iv) the obviousness of the presence or the likely presence of contamination on the property; and

(v) the ability to detect the contamination by appropriate inspection.

(d) (i) Nothing in subsections ~~(5)(b)~~ (7)(b) and ~~(5)(c)~~ (7)(c) or in this subsection ~~(6)~~ (8) may diminish the liability of a previous owner or operator of the facility who would otherwise be liable under this part.

(ii) Notwithstanding this subsection ~~(6)~~ (8), if the previous owner or operator obtained actual knowledge of the release or threatened release of a hazardous or deleterious substance at the facility when the person owned the real property and then subsequently transferred ownership of the property to another person without disclosing the knowledge, the previous owner is liable under subsections (1), ~~through (3)~~ (4), and (5) and no defense under subsection ~~(5)(b)~~ (7)(b) or ~~(5)(c)~~ (7)(c) is available to that person.

(e) Nothing in this subsection ~~(6)~~ (8) affects the liability under this part of a person who, by any act or omission, caused or contributed to the release or threatened release of a hazardous or deleterious substance that is the subject of the action relating to the facility."

**Section 4.** Section 75-10-718, MCA, is amended to read:

**"75-10-718. Liability of remedial action contractor.** (1) A person who is a remedial action contractor with respect to a release or threatened release of a hazardous or deleterious substance is not liable under this part to any person for injuries, costs, damages, expenses, or other liability that results from the release or threatened release, including but not limited to claims for indemnification or contribution and

claims by third parties for death, personal injury, illness, loss or damage to property, or economic loss.

(2) Immunity from liability, pursuant to subsection (1), does not apply in the case of a release that is caused by conduct of the remedial action contractor that is negligent or grossly negligent or that constitutes intentional misconduct.

(3) This section does not affect the liability of a person under a warranty under federal, state, or common law or the liability to an employee of an employer who is a remedial action contractor under any provision of law, including any provision of a law relating to workers' compensation.

(4) A state agency~~,~~ or state employee~~,~~ or an employee of a political subdivision who provides services relating to remedial action while acting within the scope of ~~its~~ the entity's or ~~his~~ individual's authority as a governmental agency or employee has the same exemption from liability as is provided to the remedial action contractor under this section.

(5) The defense provided by ~~75-10-715(5)(c)~~ 75-10-715(7)(c) is not available to a person liable under 75-10-715(1) with respect to remedial action costs or damages caused by an act or omission of a remedial action contractor.

(6) Except as provided in subsections (4) and (5), this section does not affect the liability under this part of a person other than a remedial action contractor.

(7) This section does not affect the plaintiff's burden of establishing liability under this part.

(8) This section does not minimize the liability, lessen the standard of liability, or otherwise shield from liability a potentially liable person under 75-10-715 or section 107 of CERCLA for costs or damages incurred as a result of a release or threatened release of a hazardous or deleterious substance."

**Section 5.** Section 75-10-722, MCA, is amended to read:

"**75-10-722. Payment of state costs and penalties.** (1) The department shall keep a record of the state's remedial action costs.

(2) Based on this record, the department shall require a person liable under 75-10-715 to pay the amount of the state's remedial action costs and, if applicable, penalties under ~~75-10-715(3)~~ 75-10-715(5).

(3) If the state's remedial action costs and penalties are not paid by the liable person to the department within 60 days after receipt of notice that the costs and penalties are due, the department shall bring an action in the name of the state to recover the amount owed plus reasonable legal expenses.

(4) An action to recover remedial action costs may be brought under this section at any time after

any remedial action costs have been incurred, and the court may enter a declaratory judgment on liability for remedial action costs that is binding on any subsequent action or actions to recover further remedial action costs. The court may disallow costs or damages only if the person liable under 75-10-715 can show on the record that the costs are not reasonable and are not consistent with this part.

(5) An initial action for recovery of remedial action costs must be commenced within 6 years after initiation of physical onsite construction of the remedial action.

(6) Remedial action costs and any penalties recovered by the state under 75-10-715 must be deposited into the environmental quality protection fund established in 75-10-704."

NEW SECTION. **Section 6. Effective date.** [This act] is effective on passage and approval.

-END-

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|---|---|---|---|
| | TRANSMITTED TO HOUSE | | |
| 1/30 | FIRST READING | | |
| 1/30 | REFERRED TO BUSINESS & LABOR | | |
| 2/07 | HEARING | | |
| 2/08 | COMMITTEE REPORT—BILL CONCURRED | | |
| 2/21 | 2ND READING CONCURRED | 95 | 2 |
| 2/22 | 3RD READING CONCURRED | 96 | 1 |
| | RETURNED TO SENATE | | |
| 2/28 | SIGNED BY PRESIDENT | | |
| 3/02 | SIGNED BY SPEAKER | | |
| 3/02 | TRANSMITTED TO GOVERNOR | | |
| 3/03 | SIGNED BY GOVERNOR | | |
| | CHAPTER NUMBER 79 | | |
| | EFFECTIVE DATE: 03/03/95 | | |

INTRODUCED BY GAGE

REVISE THE COMPUTATION OF THE STATE LAND EQUALIZATION PAYMENT TO FULLY REIMBURSE COUNTIES FOR LOST TAXES BECAUSE OF STATE LANDS WITHIN THE COUNTIES

| | | | |
|---|---|---|---|
| 1/19 | INTRODUCED | | |
| 1/19 | FIRST READING | | |
| 1/19 | REFERRED TO LOCAL GOVERNMENT | | |
| 1/20 | FISCAL NOTE REQUESTED | | |
| 1/24 | FISCAL NOTE RECEIVED | | |
| 1/24 | FISCAL NOTE PRINTED | | |
| 1/31 | HEARING | | |
| 2/08 | COMMITTEE REPORT—BILL PASSED AS AMENDED | | |
| 2/09 | 2ND READING PASSED | 49 | 0 |
| 2/10 | 3RD READING PASSED | 45 | 4 |
| | TRANSMITTED TO HOUSE | | |
| 2/13 | FIRST READING | | |
| 2/15 | REFERRED TO TAXATION | | |
| 3/03 | HEARING | | |
| 3/07 | TABLED IN COMMITTEE | | |
| | DIED IN COMMITTEE | | |

INTRODUCED BY JERGESON, ET AL.

GENERALLY REVISE THE METHOD OF VALUING IRRIGATED AGRICULTURAL LAND

| | | | |
|---|---|---|---|
| 1/19 | INTRODUCED | | |
| 1/19 | FIRST READING | | |
| 1/19 | REFERRED TO AGRICULTURE, LIVESTOCK & IRRIGATION | | |
| 1/20 | FISCAL NOTE REQUESTED | | |
| 1/21 | REREFERRED TO TAXATION | | |
| 1/26 | FISCAL NOTE RECEIVED | | |
| 1/27 | FISCAL NOTE PRINTED | | |
| 2/03 | HEARING | | |
| 3/03 | COMMITTEE REPORT—BILL PASSED AS AMENDED | | |
| 3/06 | 2ND READING PASSED AS AMENDED | 38 | 11 |
| 3/07 | 3RD READING PASSED | 40 | 9 |
| | TRANSMITTED TO HOUSE | | |
| 3/08 | FIRST READING | | |
| 3/08 | REFERRED TO TAXATION | | |
| 3/14 | HEARING | | |
| 3/20 | COMMITTEE REPORT—BILL CONCURRED AS AMENDED | | |
| 3/30 | 2ND READING CONCURRED | 82 | 16 |
| 3/31 | 3RD READING CONCURRED | 89 | 9 |



| | | | |
|---|---|---|---|
| | RETURNED TO SENATE WITH AMENDMENTS | | |
| 4/05 | 2ND READING AMENDMENTS NOT CONCURRED | 30 | 19 |
| 4/06 | CONFERENCE COMMITTEE APPOINTED | | |
| 4/10 | HEARING | | |
| 4/10 | CONFERENCE COMMITTEE REPORT NO. 1 | | |
| 4/11 | 2ND READING CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED | 50 | 0 |
| 4/12 | 3RD READING CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED | 49 | 0 |
| | HOUSE | | |
| 4/06 | CONFERENCE COMMITTEE APPOINTED | | |
| 4/11 | CONFERENCE COMMITTEE REPORT NO. 1 | | |
| 4/11 | 2ND READING CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED | 90 | 9 |
| 4/12 | 3RD READING CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED | 91 | 8 |
| 4/13 | SIGNED BY PRESIDENT | | |
| 4/13 | SIGNED BY SPEAKER | | |
| 4/17 | TRANSMITTED TO GOVERNOR | | |
| 4/26 | SIGNED BY GOVERNOR | | |
| | CHAPTER NUMBER 563 | | |
| | EFFECTIVE DATE: 04/26/95—SECTIONS 1, 3, 5 & 6 | | |
| | EFFECTIVE DATE: 01/01/97—SECTION 2 | | |
| | EFFECTIVE DATE: 01/01/98—SECTION 4 | | |

SB 199 INTRODUCED BY FOSTER

CREATE SITING CRITERIA FOR COMMERCIAL HAZARDOUS WASTE INCINERATORS

| | | | |
|---|---|---|---|
| 1/19 | INTRODUCED | | |
| 1/19 | FIRST READING | | |
| 1/19 | REFERRED TO NATURAL RESOURCES | | |
| 1/23 | FISCAL NOTE REQUESTED | | |
| 1/27 | FISCAL NOTE RECEIVED | | |
| 1/27 | FISCAL NOTE PRINTED | | |
| 1/30 | HEARING | | |
| 2/11 | MOTION FAILED TO TAKE FROM COMMITTEE AND PLACE ON 2ND READING | 18 | 32 |
| 2/13 | TABLED IN COMMITTEE | | |
| 2/23 | MISSED TRANSMITTAL DEADLINE FOR 45TH DAY | | |
| | DIED IN COMMITTEE | | |

SB 200 INTRODUCED BY LYNCH, ET AL.

REVISE THE COMPREHENSIVE ENVIRONMENTAL CLEANUP AND RESPONSIBILITY ACT

| | | | |
|---|---|---|---|
| 1/19 | INTRODUCED | | |
| 1/19 | FIRST READING | | |
| 1/19 | REFERRED TO JUDICIARY | | |
| 1/31 | HEARING | | |
| 2/03 | COMMITTEE REPORT—BILL PASSED AS AMENDED | | |
| 2/04 | 2ND READING PASSED | 45 | 0 |
| 2/06 | 3RD READING PASSED | 45 | 0 |
| | TRANSMITTED TO HOUSE | | |
| 2/07 | FIRST READING | | |
| 2/15 | REFERRED TO NATURAL RESOURCES | | |
| 3/06 | HEARING | | |
| 3/09 | COMMITTEE REPORT—BILL CONCURRED AS AMENDED | | |
| 3/27 | 2ND READING CONCURRED AS AMENDED | 90 | 6 |
| 3/29 | 3RD READING CONCURRED | 95 | 5 |

| | | | |
|---|---|---|---|
| | RETURNED TO SENATE WITH AMENDMENTS | | |
| 4/04 | 2ND READING AMENDMENTS CONCURRED | 49 | 0 |
| 4/05 | 3RD READING AMENDMENTS CONCURRED | 50 | 0 |
| 4/08 | SIGNED BY PRESIDENT | | |
| 4/10 | SIGNED BY SPEAKER | | |
| 4/10 | TRANSMITTED TO GOVERNOR | | |
| 4/14 | SIGNED BY GOVERNOR | | |
| | CHAPTER NUMBER 490 | | |
| | EFFECTIVE DATE: 04/14/95 | | |

SB 201 INTRODUCED BY BURNETT, ET AL.

AUTHORIZE DRUG OR ALCOHOL TESTING AS A CONDITION OF CONTINUED EMPLOYMENT WHEN EMPLOYER HAS REASON TO BELIEVE THAT AN EMPLOYEE MAY HAVE CONTRIBUTED TO A WORK-RELATED ACCIDENT THAT CAUSES DEATH OR PERSONAL INJURY OR PROPERTY DAMAGE IN EXCESS OF $1,500

| | | | |
|---|---|---|---|
| 1/19 | INTRODUCED | | |
| 1/19 | FIRST READING | | |
| 1/19 | REFERRED TO LABOR & EMPLOYMENT RELATIONS | | |
| 2/02 | HEARING | | |
| 2/09 | COMMITTEE REPORT—BILL PASSED | | |
| 2/10 | 2ND READING PASSED AS AMENDED | 46 | 3 |
| 2/11 | 3RD READING PASSED | 41 | 8 |
| | TRANSMITTED TO HOUSE | | |
| 2/11 | FIRST READING | | |
| 2/15 | REFERRED TO BUSINESS & LABOR | | |
| 3/02 | HEARING | | |
| 3/07 | COMMITTEE REPORT—BILL CONCURRED AS AMENDED | | |
| 3/11 | 2ND READING CONCURRED AS AMENDED | 90 | 7 |
| 3/14 | 3RD READING CONCURRED | 86 | 13 |
| | RETURNED TO SENATE WITH AMENDMENTS | | |
| 3/18 | 2ND READING AMENDMENTS NOT CONCURRED | 26 | 20 |
| 3/21 | CONFERENCE COMMITTEE APPOINTED | | |
| 4/04 | HEARING | | |
| 4/04 | CONFERENCE COMMITTEE REPORT NO. 1 | | |
| 4/05 | 2ND READING CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED | 49 | 1 |
| 4/06 | 3RD READING CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED | 48 | 2 |
| | HOUSE | | |
| 3/28 | CONFERENCE COMMITTEE APPOINTED | | |
| 4/05 | CONFERENCE COMMITTEE REPORT NO. 1 | | |
| 4/06 | 2ND READING CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED | 83 | 16 |
| 4/07 | 3RD READING CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED | 75 | 21 |
| 4/11 | SIGNED BY PRESIDENT | | |
| 4/11 | SIGNED BY SPEAKER | | |
| 4/11 | TRANSMITTED TO GOVERNOR | | |
| 4/14 | SIGNED BY GOVERNOR | | |
| | CHAPTER NUMBER 445 | | |
| | EFFECTIVE DATE: 04/14/95 | | |

3 202 INTRODUCED BY JERGESON, ET AL.

REMOVE TERMINATION OF THE FRAUD, WASTE, AND ABUSE HOTLINE

BY REQUEST OF THE LEGISLATIVE AUDIT COMMITTEE

| | | | |
|---|---|---|---|
| 1/19 | INTRODUCED | | |
| 1/19 | FIRST READING | | |



| | | | |
|---|---|---|---|
| 1/19 | REFERRED TO STATE ADMINISTRATION | | |
| 1/20 | FISCAL NOTE REQUESTED | | |
| 1/25 | FISCAL NOTE RECEIVED | | |
| 1/25 | FISCAL NOTE PRINTED | | |
| 2/03 | HEARING | | |
| 2/08 | COMMITTEE REPORT—BILL PASSED | | |
| 2/09 | 2ND READING PASSED | 49 | 0 |
| 2/10 | 3RD READING PASSED | 49 | 0 |
| | TRANSMITTED TO HOUSE | | |
| 2/13 | FIRST READING | | |
| 2/15 | REFERRED TO STATE ADMINISTRATION | | |
| 3/02 | HEARING | | |
| 3/02 | COMMITTEE REPORT—BILL CONCURRED | | |
| 3/04 | 2ND READING CONCURRED | 96 | 2 |
| 3/06 | 3RD READING CONCURRED | 95 | 5 |
| | RETURNED TO SENATE | | |
| 3/07 | SIGNED BY PRESIDENT | | |
| 3/07 | SIGNED BY SPEAKER | | |
| 3/08 | TRANSMITTED TO GOVERNOR | | |
| 3/09 | SIGNED BY GOVERNOR | | |
| | CHAPTER NUMBER 97 | | |
| | EFFECTIVE DATE: 03/09/95 | | |

SB 203 INTRODUCED BY GROSFIELD, ET AL.

RATIFY A RESERVED WATER RIGHTS COMPACT BETWEEN THE UNITED STATES NATIONAL PARK SERVICE AND THE STATE OF MONTANA FOR THE BIGHORN CANYON NATIONAL RECREATION AREA AND THE LITTLE BIGHORN BATTLEFIELD NATIONAL MONUMENT

BY REQUEST OF THE RESERVED WATER RIGHTS COMPACT COMMISSION

| | | | |
|---|---|---|---|
| 1/19 | INTRODUCED | | |
| 1/19 | FIRST READING | | |
| 1/19 | REFERRED TO JUDICIARY | | |
| 1/26 | HEARING | | |
| 1/28 | COMMITTEE REPORT—BILL PASSED | | |
| 1/30 | 2ND READING PASSED | 50 | 0 |
| 1/31 | 3RD READING PASSED | 49 | 0 |
| | TRANSMITTED TO HOUSE | | |
| 2/01 | FIRST READING | | |
| 2/01 | REFERRED TO NATURAL RESOURCES | | |
| 2/10 | HEARING | | |
| 3/06 | COMMITTEE REPORT—BILL CONCURRED | | |
| 3/07 | 2ND READING CONCURRED | 80 | 20 |
| 3/08 | 3RD READING CONCURRED | 78 | 22 |
| | RETURNED TO SENATE | | |
| 3/11 | SIGNED BY PRESIDENT | | |
| 3/11 | SIGNED BY SPEAKER | | |
| 3/13 | TRANSMITTED TO GOVERNOR | | |
| 3/15 | SIGNED BY GOVERNOR | | |
| | CHAPTER NUMBER 149 | | |
| | EFFECTIVE UPON SIGNATURE OF PARTIES | | |

SB 204 INTRODUCED BY GROSFIELD, ET AL.

CLARIFY EXISTING ENFORCEMENT AUTHORITY UNDER THE PUBLIC WATER SUPPLY LAWS

BY REQUEST OF THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES

| | | | |
|---|---|---|---|
| 1/20 | INTRODUCED | | |

# MINUTES

## MONTANA SENATE
## 54th LEGISLATURE - REGULAR SESSION

## COMMITTEE ON JUDICIARY

**Call to Order:** By **ACTING CHAIRMAN REINY JABS**, on January 31, 1995, at 10:00 A.M.

### ROLL CALL

**Members Present:**

Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Valencia Lane, Legislative Council
Judy Feland, Committee Secretary

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing: SB 200, SB 132
Executive Action: None.

### HEARING ON SB 200

Opening Statement by Sponsor:

**SENATOR J.D. LYNCH, Senate District 19 of Butte,** sponsored SB 200. The bill involves banks, lenders and borrowers as well. He said the amendments as proposed by the Department of Health **(EXHIBIT 1)** are acceptable to him. He said there was a problem in our state primarily as a result of a case in his area where a pole plant borrowed quite a bit of money from a local bank and it was later determined that the plant was on ground that needed cleaning up. ARCO, who was formerly involved, decided that the lender who had lent the money to the plant that had been there for years, should also be a potential responsible party. They

were exercising the deep pocket theory in looking for the lender to be responsible for some of the clean up involved. The lender settled for perhaps several hundreds of thousands of dollars plus legal fees of about the same. The small bank was, of course, sorely strapped because of this. The lenders around the state are extremely reluctant to lend money to someone who might potentially be on ground that is not pure. He said he was thinking of small towns with former small gas stations with tanks underneath. He said it would be a problem if a person owned the lot and wanted to move the tanks and improve the lot. When he went to the bank for that loan, there would be a question if the bank was responsible if they lent that money. He likened this to loaning money for a friend to buy an automobile, and the auto was involved in an accident, he would be responsible when in fact, he had no interest in the situation outside of the loan. Should a legitimate lender who had nothing to do with the business be responsible for what is beyond their control? This bill says, "no." It is not the responsibility of the lender. He explained that it was a borrowers' bill because in many cases the lenders are stopping the loaning of money in these situations because they are not going to be caught up, not should they be, if they are responsible to their stockholders. He said the bill was about cleaning up our lot and to conform it to the federal standards.

Proponents' Testimony:

**Frank Crowley, attorney, representing the Montana Bankers Association,** said he had worked for the past several weeks helping **SENATOR LYNCH** to draft the bill that would clarify the so called, "secured creditor exemption" under Montana's many-superfund law. He presented a fact sheet for the committee shown as **(EXHIBIT 2).** It explains that this bill conforms parts of Montana's law (CECRA), Comprehensive Environmental Cleanup and Responsibility Act, to the analogous provisions of the Federal Superfund Law (CERCLA), Comprehensive Environmental Response, Compensation, and Liability Act. He read from the document explaining the indicia of ownership. There have been substantial debates about what it means to hold indicia, he said. As a result of several court decisions and confusion at the federal level, the EPA launched a very long, very productive process which resulted in the adoption of a lender liability rule in 1992 that attempts to define for everyone what it means to be a secured creditor to get yourself out of potential liability under CECRA. What the bill attempts to say that the State of Montana, which has a verbatim version of the secured creditor exemptions, means and intends that the scope of that intention is the same under our law as it is under federal law. He referred to Page 8 and 9 of the bill, where he said 90 per cent of the language to be inserted in the statute will be found. He said it is a list of specific activities that lenders engage in, without being deemed to participate in the management of a facility. It also says that if the bank would get involved and engage in the operation on a day-to-day basis, they lose the exemption, which

matches federal language, he said. After the bill was drafted, he said that the Montana Bankers Association requested a meeting with the State Department of Health because DHES administers this statute and oversee site clean-up in the state. He said they had two productive meetings with Director Robinson and Bill Kirley, who is the staff attorney with the CECRA. As a result, he proposed an amendment sheet **(EXHIBIT 3)** which meets the department's needs for some clarification and housekeeping changes. They don't affect the intent of the bill very much, he said. He referred to 23 and 24 which relate to statutes of limitations. There was some concern that the CECRA limitations were the same as the federal. There is some room for ambiguity, he said.

**Bruce Gerlock, president of the Montana Independent Bankers Association, and senior vice-president of the First Security Bank in Bozeman,** asked the committee to support SB 200. The MIBA represents 47 community banks and federal savings banks throughout Montana. The independent bankers, in locally owned and operated banks, want to help businesses in their communities, he said. They believe in local businesses that provide jobs and pay taxes, however, up to this point,he said, those business concerns that dealt with environmentally-related products were pretty much left out of the credit-granting cycle. If not left out, he explained, those businesses were compelled to prove to the lenders that the businesses were environmentally clean, because the lender was potentially liable for any clean-up costs should the loan go into default and the lender take possession of the property involved. The lender would become part of the chair of title. The lender was perceived to have deep pockets and could afford the remedial action moreso than any of the previous owners. Bankers become nervous over the potential liability and simply avoid those type of business loans. Why should they take the risk, he asked? Why jeopardize the bank and the stockholders? This course of action was no good for those small businessmen wanting to operate those environmentally-related businesses whether that be gas stations, paint stores or bulk distributors. Those small businesses need credit for expansion, equipment and operating like any other business, he said. SB 200 would offer the exemption from liability lenders need to help those affected small business concerns. The MIBA strongly supports SB 200, **Mr. Gerlock** said. They believe that granting credit to environmentally-related businesses is possible because the exemption offered to secured creditors who take real property to protect the security interest and do not participate in its management. The bill is good for community bankers which also means that it is good for small business and local communities.

**J. Edward O'Neill, Senior vice-president and Senior lender at Valley Bank and Helena,** said that his firm is a locally owned community bank. He spoke in favor of the proposed legislation. It was important to clarify and standardize both the federal and state legislation, he said, because of the confusion and confusion lends itself to fear to both banks and borrowers. He

said a community customer wanted to borrow money to re-finance his building in downtown Helena. In the normal course of business, **Mr. O'Neill** requested an appraisal which was returned with the note that there was an "apparent existence of underground storage tanks." Red flags popped out to everyone concerned. They had proposed a SBA guaranteed loan and the SBA requested that both the EPQA and the DHES sign off of what was, in fact, acceptable collateral. So the were dealing with three separate agencies and their concerns were multiplied. The business was forced to utilize two separate attorneys and an engineering firm who had to investigate the laws and had to consult with different agencies regarding the difference involved in the rules. They finally got the SBA to agree with the legal research that was done and made the loan, but not before the borrower was exposed to a lot of legal expenses and time delays. He ultimately ended up losing the interest rate as well because the rates moved during the course of the approval and final approval. **Mr. O'Neill** recommended a Do Pass vote on this bill which would not only benefit bankers, but also commercial operations on Main Street in Helena and across Montana.

**Tim Gill, President of Montana Livestock Agriculture Credit, Inc.,** said that his organization was a statewide agency lender based in Helena. They do support the bill, he said, because it has directly affected some of the financial requests they handled in recent years. Their small independent company could not afford the resources to do in-depth investigations beyond the standards of appraisals and any significant environmental liability means that their company has to back away from the loan immediately. They also represent several out-of-state insurance companies or help their customers access them for ranch and real estate loans. In many cases, he said, they decline to use a piece of property for a variety of reasons, all the way down to the fact that a transformer has some PCB's or maybe an old garbage dump is causing concern or one pesticide bucket in the wrong place. He asked for support on the bill.

**Ronna Alexander, representing the Montana Petroleum Marketers Association,** which, she said, are the wholesalers and distributors of petroleum products in Montana. There are currently 115 members in the association, and in addition to the bulk operations, most of them also own retain locations. About seventy per cent of the underground storage tanks in Montana are owned by this tier of the industry. Lender liability had become a critical issue to these independent business people. In 1988 federal EPA regulations went into effect that regulated the up-grade, removal, and replacement of these underground tanks over a 10-year period with the final deadline of 1998 for those that own fewer than 10 tanks. At the time the EPA promulgated these rules, their own predictions were that 75 percent of all rural gas stations in the country would close because of the expenditures involved. Coupled with that, there has been the problem of obtaining loans in order to upgrade these gas stations, not because of their inability to service the debt, but

because the lending institutions have been very reluctant to become involved in these properties where contamination might occur and require expensive clean-up. She said that their organization had been working on this issue on the national level for several years to no avail, and so for Montana to revise their secured credit language would benefit these and all parties involved. She urged positive consideration of SB 200.

**Don Hutchinson, representing the Department of Commerce, Financial Division,** spoke in support of the bill. As the state's financial commissioner, he was concerned with the safety and soundness of the 156 financial institutions in Montana. As it now stands, CERCLA potentially puts at risk the soundness of every lender and the safety of those institutions, he said. Many lenders could be rendered insolvent under these circumstances. When insolvency occurs, the federal government will end up paying the clean-up costs with FDIC dollars rather than the Superfund dollars and the community institutions will be destroyed. This legislation will remedy this problem, he said. CERCLA's goal is to make this country an environmentally safer place to live. Under the law, he said, his responsibility was to assure the safety of the depositors' funds in state-charged financial institutions with the State of Montana by examining and regulating them for soundness. These goals need not be incompatible, he said. In the end, however, he told the committee to remember than rendering a lender insolvent will merely assume that the federal government will assume a greater share of the clean-up costs and a community could lose its financial institutions.

**David Owen represented the Montana Chamber of Commerce.** In order to represent the 840 volunteer members of the organization, he said, they had to travel to 21 cities twice a year to keep in touch. One of the things that came to their attention on the tour in the fall of 1993, was the situation already explained here. Because of the reluctance of banks and business people to restore and finance old gas stations and other properties, many old sites, many at the center of their communities, will sit abandoned and vacant until someone can facilitate a way to ensure production use of those facilities. He urged a favorable consideration of the bill.

**Steve Turkiewicz, Executive Vice-President of the Montana Automobile Dealers Association,** represented the group which he said is a trader organization for new and used car and truck dealers. Throughout Montana's history, many car dealerships have evolved from service stations, carriage houses and a variety of other businesses established as early as the early 1900's. Over those times, management practices for disposing of wastes were in place that are no longer considered desirable, even though acceptable at the time. He thought this bill would bring much-needed help to their members and all business people who have had to face those problems, and who, along with their lenders, could bring these facilities into compliance.

**Riley Johnson, representing the National Federation of Independent Business (NFIB),** said that the organization made of up 9,000 small business members support SB 200.

**Bob Pyfer, Senior Vice-President for the Montana Credit Unions League,** spoke in favor of the proposed legislation. Credit unions do a very limited amount of business lending, he said, but some credit unions are making small-member business loans. They were concerned that the law might be interpreted to apply to residential lending under certain circumstances, which many of their members were getting into, along with home equity lending. SB 200 represented a fair approach to the problem, he said, and urged a Do Pass recommendation.

**Bob Stephens, representing the Montana Graingrowers Association and also the Dutton State Bank,** told the committee about a young man in the Dutton community with a gas station/bulk plant business who has tried for a year to get financing with the bank. They turned him down twice because of the potential ramification of the environmental threat. The SBA has turned him down, too, he said. With this legislation, he was sure the man could acquire financing and proceed with his business plans. He urged passage of the bill.

**Bob Robinson, Director of the Department of Health and Environmental Sciences,** spoke as a proponent of the bill with the addition of the amendments. From a non-banker position, he said the bill brought a sense of fairness to the lender, operating as a banker, a trustee or fiduciary. He thought it clarified the liability section of the CECRA law and would be a valuable improvement. The friendly amendments, he said, were developed jointly with his department and the original drafter of the bill from the Bankers' Association. As stated earlier, he said, they offered to have the department review the bill and it was determined that there were some unintended loopholes which have been addressed. The department supported the bill, he said.

**Bill Kirley, a council member for the Department of Health, Environmental Remediation Division,** prepared written testimony which he said would be a road map for the amendments offered **(EXHIBIT 4).**

**John Cadby, representing the Montana Bankers Association,** spoke in favor of SB 200. He said this bill have been a great example of the public and private sector working together to help clean up the environment for all of us.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

**SENATOR STEVE DOHERTY** asked **Mr. Kirley** about fiduciary liability

when he said that Montana could become a national leader in putting a cap on liability. Perhaps it would be an incredibly stupid step that nobody else has taken in order to protect banks.

**Mr. Kirley** said that while there has been some discussion of this issue on that level, no decision had been adopted at the federal level. EPA, in its funded liability rule, did not directly address fiduciary liability in this fashion, however, the Superfund Reauthorization Act which died on the last day of the last congress, has been re-introduced in the current congress, and does address fiduciaries. In fact, the language they used in the bill has been taken from one of the versions of the proposed federal act. We are not adopting what isn't a federal law on this, in usual fashion, but rather are out ahead on this issue and expect the federal government to catch up later, he said.

**SENATOR DOHERTY** asked if any other states had done this.

**Mr. Crowley** answered the question by saying that by his canvass of some state laws, he had seen three or four states that had some fiduciary provisions that are somewhat similar to this. He said it was a fairly narrow exemption in that it limits the liability of the trustee to the absence of the trust. It does not exempt the trustee, even if they just had a property that lands on their trust part, they are still liable for the clean up.
The exemption for fiduciaries is not a true exemption. Even if someone dies and the property passes into the trust department of the bank, if that property is contaminated, there is no exemption from liability for that trustee or fiduciary in this rule. It says, "the limits of the cash that go for the clean-up are limited to the assets of the estate of the trust." But the bank itself (the trust department) cannot be held to clean up that property above and beyond the trust assets.

**SENATOR DOHERTY** asked why the EPA did not adopt the rule that they were proposing.

**Mr. Crowley** answered that the EPA Lender Liability rule adopted in 1992 did not directly address the liability of fiduciaries. There was mention of them in the preamble of the rule. As Bill Kirley mentioned, both Senate and House versions of the Superfund Reform Legislation that was before the congress last fall had provisions for limited exemptions for trustees and fiduciaries.

**Mr. Kirley** said that the change is not included in the EPA rule is that it really is a change of the legal standard of the liability and not something that the agency could adopt by rule. In fact, in Kelly vs. EPA, the court found that even on the lender issue the EPA had gone too far in exercising their authority. That change would need to be made in statute, not by executive rule, he said.

**SENATOR DOHERTY** asked who would be liable if it all fell apart. If the bank was not liable, the fiduciary was not liable, who would be liable, he asked?

**Mr. Kirley** answered that it was a very fact-specific question depending what parties were out there. There are still a range of parties that are liable under the act including the current owner or operator, and the person who owned the property at the time of the disposal.

**SENATOR DOHERTY** asked him to envision that they'd all gone bankrupt. The only one left was the bank. The bank owns the property now that they made the loans on. Who would be liable for the clean up?

**Mr. Kirley** said that at that point, where there is no liable party, there is a fund established, the Equality Protection Fun that gets money from the RIT (Resource Indemnity Trust). That money has been used to clean up sites where there has been no responsible party available.

**SENATOR DOHERTY** asked, "the taxpayers?"

**Mr. Kirley** answered, "yes."

**SENATOR BRUCE CRIPPEN** asked **Mr. Kirley** about the statute of limitations. He said, for an example, in the old days they had service station on every corner of town. A lot of those have been changed to yogurt shops, etc., many built over old grease spills and traps. He wanted to know if those things happened in 1950 and in 1993 the current owner wanted to get financial aid, how the statute of limitations would apply.

**Mr. Kirley** said that the question dealt more with retroactive liability. The question is who can be held accountable on this site, he said. The liability can be imposed on a party for contamination that continues today. It imposes liability today for actions that may have been conducted prior to enactment of the statute if those actions have environmental consequences today. If there is a release of hazardous substances today that poses an intermittent and substantial endangerment to human health or the environment, the current owner of the property can be required to clean it up, the person who owned the property at the time of the disposal of those substances can be required to clean it up, the party who may have generated those hazardous substances and caused them to be dumped there could be liable fo cleaning them up, he said.

**SENATOR CRIPPEN** asked if the individual sold the property under contract for deed, still retaining ownership, what would happen?

**Mr. Kirley** said it was a discussion they had, and was a hard choice whether a contract for deed should be specifically included in the bill. Under contract for deed, the party who is

selling the property was initially the owner of the property and controlled and managed the property fully. They then enter into a contract for deed by which someone else controls the property and makes payments. They still remain the legal owner of the property. They are more than just a lender taking a security interest in that property; they are, in fact, the owner of the property. So they did not include contract for deed expressly in the provisions. One could certainly argue that they are included in the general clause which defines who is the holder of the security interest, but they wanted to have them taken out as one of the express parties that got the protection, he said.

**SENATOR LARRY BAER** asked **Mr. Kirley** if the bank foreclosed on the property and the bank assumes ownership and then transfers it to someone else, does the new purchaser assume the exemption as a fiduciary or security holder or does it start all over again?

**Mr. Kirley** said that the exemption from liability applies to the lender to the extent that the lender is protecting his security interest. It does not apply to the purchaser from the lender. It is similar to the EPA and the Superfund Act and a direction they thought the law was going, he explained. Under current law, the court would hold the bank liable at the point it forecloses and takes title. The bill would change that so that the bank can foreclose and take title without fear of liability as long as the bank takes actions to sell the property. If the bank wanted to hold the property and speculate, they would be as any other owner, and not treated differently.

**SENATOR BAER** asked that if the bank holds a foreclosure proceeding and sheriff's sale and a third party purchases the property, would that party will be subject to liability under the law without any exception as the bank held?

**Mr. Kirley** said that it was correct.

**SENATOR SUE BARTLETT** asked **Mr. Kirley** if since the theoretical property in question here was contaminated, would it surprise him if there were no buyers? What is the liability of the bank if they cannot unload that property?

**Mr. Kirley** said the lenders' concern was the threat that the clean-up may greatly exceed the value of the property. If that were the case, they stand to lose much more than the value of the property, and the bank's other assets could be attached as well. The bill attempts to address that by saying that even by taking the property by foreclosing and trying to sell it, the bank does not incur liability and its other assets are not exposed. If the property is worth nothing as a result, the asset is worth nothing, and that's the economic consequence of the contamination. He said she had recognized a problem they have not been able to resolve. He said there still could be other parties that might be liable for the clean-up, he said. It is not likely when the bank has foreclosed.

**SENATOR BARTLETT** asked **Mr. Gerlock,** realistically, how much will this free up a bankers' willingness to lend if there is potentia for liability on the land they intend to purchase?

**Mr. Gerlock** said that most lenders will be relieved if this bill passes. Currently the cost of clean-up to the small business owner is in terms of a Phase I Environmental Assessment costing $2,000 and a Phase II for $5,000 then depending on the remedial action necessary, it gets more expensive. Lenders and the SBA now have internal loan policies and require an environmental loa questioning if they find even a hint of contamination. He also addressed the earlier question and told the senator that if the property is so contaminated it has no value, the bank will abandon the property.

**SENATOR BARTLETT** asked if that would include letting property taxes go delinquent.

**Mr. Gerlock** said that he had seen that happen.

**SENATOR BARTLETT** asked when taxes had been delinquent for 36 months what happens, but **Mr. Gerlock** did not know. She said the counties were then required to take a tax deed for the property and it ends up in the lap of the county.

**Mr. Gerlock** said it was his experience in environmental clean-up in smaller communities that the majority are not major in size o overly expensive. They can be remedied at minimal cost, he said.

**SENATOR BARTLETT** further stated that the EPA had proposed and adopted a rule on the lender liability portion and that rule had subsequently been declared invalid by the federal courts because apparently the statute itself did not authorize the EPA to enter into that area of rulemaking. Would he consider that to be a clear example of an executive branch to be exceeding the authority of what the legislative branch had granted in adopting burdensome rules?

**Mr. Gerlock** said he could only speculate and would not feel comfortable answering that question. When pressed for an opinio by the senator, he replied that he would agree with the statement.

**SENATOR DOHERTY** asked about the amendments on Page 1 concerning limiting exemptions for creditors and fiduciaries. They also extend those limitations and caps and exemptions to secured fiduciaries and creditors from third party claims. He asked for an example of third party claims and who would bring them.

**Mr. Kirley** gave the history. The initial bill included a clarification that liabilities to third parties would not be included. The department may bring action against Party A, he said, and it may be the only responsible party. They may bring a contribution action against Parties B and C, and however many.

**ATOR DOHERTY** said he understood that, and understood that he protecting the banks against lawsuits from the government but were they protecting banks against the lawsuits by other ities, landowners, etc., and why that would be a good policy.

**Kirley** explained that it was from the one case in Montana re liability was a substantial threat on the financial vency of an institution. It was the Miners' Bank case in te, he said. In that case the federal government had ermined based on its lender liability rule, it was not going attempt to assert liability against the Miners' Bank. The EPA e that determination. The department had made similar rtures indicating that the department had not filed action ing to recover costs, however, EPA and the department both e pursuing Atlantic Richfield for liability on that site, who turn, sued the bank. Even though the EPA said the bank was liable, ARCO was saying their interpretation of federal law that they were liable. That threat of liability did pose a l threat to the bank's financial solvency. The State of tana stepped in and entered into its own agreement with the k and mediated a settlement between them. The bank paid a stantial sum to ARCO and a smaller sum to the state, and eived contribution protection in that litigation. The threat third party liability is as great, or greater than the threat liability from the government.

**ATOR DOHERTY** said that through the amendment, would he make e that ARCO could not pursue a claim against the bank and the te could not pursue a claim against the bank?

**Kirley** said it was correct, both the bill and the amendment ld do that.

**ATOR SHARON ESTRADA** asked **Mr. Kirley** about property she owned had up for sale for many years, but because of an ironmental problem (an underground tank) finally had to sell the only buyer, the bank. They didn't want the deed, however, ause they knew the problem existed. So they sat on it until problem could be solved. If this piece of legislation goes ough, would the bank feel more secure about taking the deed?

**Kirley** said the bank assumed the liability when they assumed property. The bill would not change that. If they were the der and were taking back the property because of non-payment, n it would be changed with the new bill and they would not be osed to liability.

**ATOR LORENTS GROSFIELD** asked if the bank abandoned the perty, taxes are not paid and the title reverts to the ntry, what happens?

**Kirley** said the county, because it takes the property by oluntary acquisition, would not be one of the liable parties.

If there is no one to clean up the property and it posed a health threat, it could be done by the department using funds from the Environmental Quality Protection Fund. The department would then have a lien against the property for the expenditures.

Closing by Sponsor:

**SENATOR LYNCH** thanked the committee for the good hearing on the complicated issue. There is a problem for people trying to get loans, he said, and he did not blame the lenders for their positions in not loaning money with the present law. There is no relationship in lending money and then owing more than that because the person defaults and they are looking for deep pockets. This law would change that. He told **SENATOR DOHERTY** that his whole point in sponsoring the bill was that ARCO should not have looked to anyone else to share the responsibility.

## HEARING ON SB 132

Opening Statement by Sponsor:

**SENATOR AL BISHOP, Senate District 9,** sponsored SB 132. This was **SENATOR MIKE HALLIGAN'S** bill, he said, that he carried in 1991 and 1993. The bill is called the Technical Corrections Act regarding the state and probate. The first meeting was held in July at the annual Montana Bar Association and this material was circulated in advance of the meeting. There was a second meeting at the University Law School during the tax institute and over 20 lawyers were in attendance. Most of the changes come from the National Conference of Commissioners of Uniform State Law. Some of the changes were made by practicing lawyers in Montana, he said. It is a long, technical bill, he told the committee.

Proponents' Testimony:

**Daniel McLean, on behalf of the State Bar of Montana, Section on Trust and Tax and Business Law,** spoke in favor of the bill. The bill is a technical directions bill, he said. It is a follow-up to major changes done in the 1993 session to revamp parts of the probate code. The proposed changes are changes to the 1993 act to correct language, and many changes to the augmented state and elective share. He presented written testimony from **Professor Eck, at the Law School,** identifying item by item changes in the bill. **(EXHIBIT 5).** One important change has to do with inheritance tax, he said. Presently under state gift tax law a person can make a gift of property of up to $10,000 per year to any donee without paying any gift or inheritance tax. This is called an annual exclusion. The old rule was that gifts within three years of death were presumed to be made in contemplation of death and therefore brought back in to the estate for tax purposes. That has been irrelevant in most instances in Montana because if a person didn't have to file a federal gift tax return for that gift, then they also wouldn't have to bring it back into

# MINUTES

## MONTANA HOUSE OF REPRESENTATIVES
## 54th LEGISLATURE - REGULAR SESSION

## COMMITTEE ON NATURAL RESOURCES

**Call to Order:** By **Rep. Dick Knox, Chairman,** on March 6, 1995, at 3:00 pm.

### ROLL CALL

**Members Present:**

Rep. Dick Knox, Chairman (R)
Rep. Bill Tash, Vice Chairman (Majority) (R)
Rep. Bob Raney, Vice Chairman (Minority) (D)
Rep. Aubyn A. Curtiss (R)
Rep. Jon Ellingson (D)
Rep. David Ewer (D)
Rep. Daniel C. Fuchs (R)
Rep. Hal Harper (D)
Rep. Karl Ohs (R)
Rep. Scott J. Orr (R)
Rep. Paul Sliter (R)
Rep. Robert R. Story, Jr. (R)
Rep. Jay Stovall (R)
Rep. Emily Swanson (D)
Rep. Lila V. Taylor (R)
Rep. Cliff Trexler (R)
Rep. Carley Tuss (D)
Rep. Douglas T. Wagner (R)

**Members Excused:** None

**Members Absent:** None

**Staff Present:** Michael Kakuk, Environmental Quality Council
Alyce Rice, Committee Secretary

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing: SB 200, SB 122
Executive Action: SB 78 Be Concurred In As Amended,
SB 204 Be Concurred In As Amended,
SB 122 Be Concurred In As Amended

Tape 1, Side A

## HEARING ON SB 200

Opening Statement by Sponsor:

**SEN. J. D. LYNCH, Senate District 19, Butte,** said SB 200 is pro-consumer, pro-lender, pro-borrower and it's good for the people in Montana. Years ago there were gas stations on two corners out of four on any intersection. There aren't that many gas stations anymore because of competition, but the buildings are still there and could be used for other businesses. It is difficult for banks to loan money to convert those buildings to other businesses because the underground tanks are still there and the banks don't want to be held liable for clean up problems. In Butte there was a clean up of toxic material by a pole plant. The plant had borrowed money from a small independent bank. The bank was held responsible. The bank had to pay lawyers' fees and a settlement of over half of its bank assets. SB 200 is virtually the same as a federal law that is now being proposed in Washington D. C.

Proponents' Testimony:

**Frank Crowley, Attorney, Montana Bankers Association,** said SB 200 exempts lenders from the indicia of ownership of a facility if its primary function is to protect a security interest in the facility. The bill will protect lenders from the threat of liability. **Mr. Crowley** explained the amendments to SB 200. **EXHIBIT 1**

**William Kirley, Legal Counsel, Department of Health and Environmental Sciences (DHES).** Written testimony. **EXHIBIT 2**

**Bruce Gerlach, President, Montana Independent Bankers Association,** said independent bankers want to help small businesses. However, up to this point, business concerns that dealt with environmentally related products were often left out of the credit granting cycle because the lender was potentially liable for any clean up costs should the loan go into default and the lender took the property involved. Bankers became nervous over potential liability and avoided those types of business loans. That course of action is not good for the owners of small businesses who operate environmentally-related businesses. SB 200 offers the exemption from liability that lenders need, to help those affected small businesses.

**Tom Hopgood, Montana Independent Bankers Association.** Written testimony. **EXHIBIT 3**

Tape 1, Side B

**Ward Shanahan, Montana League of Savings Institutions,** supported SB 200, but opposed amendment 8.

**Leo Berry, Attorney, Burlington Northern Railroad,** supported SB 200.

**Bob Pyfer, Montana Credit Unions League,** supported SB 200.

**Don Hutchinson, Department of Commerce, Banking and Financial Division,** supported SB 200.

**John Shontz, Montana Association of Realtors,** said there are many orphan properties in Montana on which bad loans were made using those properties as collateral. Rather than taking those properties and attempting to do anything with them, including cleaning them up, lenders are walking away from the loans. Letters from county attorneys can be found in courthouses all over the state almost ordering the county treasurers not to take any of those properties through tax proceedings because the liability will transfer to whoever the current owner is. In many cases, those properties remain heavily polluted. They will continue to passively pollute until they can get back into the stream of property management. SB 200 will help that happen.

**Rona Alexander, Montana Petroleum Marketers Association,** supported SB 200.

**Bob Robinson, Director, Department of Health and Environmental Sciences,** supported SB 200.

**Bob Stephens, Montana Grain Growers Association, Dutton State Bank,** supported SB 200.

**John Cadby, Montana Bankers Association,** supported SB 200.

Opponents' Testimony: None

Informational Testimony: None

Questions From Committee Members and Responses:

**CHAIRMAN KNOX** said a borrower could possibly, at some point in time, say that a lender did try to influence management, therefore, the lender is responsible for the clean up and asked **Mr. Crowley** if there is enough case law that covers that problem. **Mr. Crowley** said there is case law at the federal level but it is ambiguous and sometimes conflicting. Some cases have determined that if a bank has the capacity to influence hazardous waste management of a site, it is an owner. Other cases have determined that a bank can go almost as far as foreclosing and could probably take the title to the property, but as long as the bank didn't get involved in day-to-day management of the property it wasn't an owner. The bill addresses those ambiguities by listing activities that are not classified as management participation.

Tape 2, Side A

**REP. EMILY SWANSON** asked **Mr. Crowley** to explain the difference between lender liability and fiduciary liability. **Mr. Crowley** said a lender means anyone who has secondary ownership in a property. Fiduciaries are a subset of secured creditors.

**REP. DAVID EWER** asked **Mr. Crowley** if there was any way that the proposed legislation could be used as a way of using fiduciaries to hold property in order to reduce liability. **Mr. Crowley** said that possibility has been eliminated in the bill.

**REP. AUBYN CURTISS** asked **Mr. Crowley** if a person would have to assume liability if he unwittingly bought a piece of property that had pollutants on it. **Mr. Crowley** said the word "unwittingly" would be the key. Both the federal and state superfunds have what is called "an innocent purchaser defense." If a person was unwittingly unaware that there was contamination on the property, that person would only be liable if he had failed to undertake a reasonable inquiry based upon facts available as to whether there was contamination.

Closing by Sponsor:

**SEN. LYNCH** said SB 200 is important to Montana for economic development and it will make it easier for bankers to justify a loan.

Tape 2, Side B

## HEARING ON SB 122

Opening Statement by Sponsor:

**SEN. DARYL TOEWS, Senate District 48, Lustre,** said SB 122 addresses the relationship between the utility companies and the Department of State Lands (DSL). The bill revises the process of granting right-of-way easements on state lands and clears up a lot of red tape. There is an amendment that would give the bill an immediate effective date. **EXHIBIT 4**

Proponents' Testimony:

**Gary Wiens, Montana Electric Cooperative Association,** supported SB 122 because it eases the burden of government mandates without compromising the intent behind the permitting process. The existing process has caused needless delays and costs. Delays have resulted in missed construction seasons creating added frustration and costs for farmers, ranchers, homeowners and others in need of power and telephone service. Ranchers have also missed opportunities to pasture livestock on state lands due to the inability to bring power to watering troughs. **Mr. Wiens** urged the committee to support SB 122.